SCC File No. 37985

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

RESOLUTE FP CANADA INC.

Appellant
(Respondent)

– and –

HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTRY OF THE ATTORNEY GENERAL and WEYERHAEUSER COMPANY LIMITED

Respondents
(Appellants)

AND BETWEEN:

HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTRY OF THE ATTORNEY GENERAL

Appellant
(Appellant)

– and –

WEYERHAEUSER COMPANY LIMITED and RESOLUTE FP CANADA INC.

Respondents
(Respondents)

AND BETWEEN:

WEYERHAEUSER COMPANY LIMITED

Appellant
(Respondent)

– and –

HER MAJESTY THE QUEEN AS REPRESENTED BY THE MINISTRY OF THE ATTORNEY GENERAL

Respondent
(Appellant)

FACTUM OF THE RESPONDENT,
WEYERHAEUSER COMPANY LIMITED
TO THE APPEAL BY RESOLUTE FP CANADA INC.
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3

Christopher D. Bredt
Markus F. Kremer
Alannah Fotheringham
Tel: 416-367-6165
416.367.6658
416.367.6394
Fax: 416-367-6749
Email: CBredt@blg.com
MKremer@blg.com |
AFotheringham@blg.com

Counsel for the Appellant/Respondent,
Weyerhaeuser Company Limited

Borden Ladner Gervais LLP
World Exchange Plaza
1300 - 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: 613.787.3520

Fax: 613.230.8842
Email: neffendi@blg.com

Agent for the Appellant/ Respondent,
Weyerhaeuser Company Limited

ORIGINAL TO: **THE REGISTRAR**
301 Wellington Street
Ottawa, ON K1P 0J1

COPIES TO:

Ministry of the Attorney General
Crown Law Office – Civil Law
8th Floor, 720 Bay Street
Toronto, ON M5G 2K1

Leonard Marsello
Tamara Barclay
Nansy Ghobrial
Tel: 416.326.4939
Fax: 416.326.4181
Email: leonard.marsello@ontario.ca

Counsel for the Appellant/Respondent
Her Majesty the Queen as represented by the
Ministry of the Attorney General

Supreme Advocacy LLP
100 – 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695-8855
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Appellant/Respondent
Her Majesty the Queen as represented by the
Ministry of the Attorney General

Torys LLP
79 Wellington Street, 30th Floor
Box 270, TD South Tower
Toronto, ON M5K IN2

Andrew Bernstein
Jeremy R. Opolsky
Tel: 416.865.7678
Fax: 416.865.7380
Email: abernstein@torys.com | jopolsky@torys.com

Counsel for the Appellant/Respondent, Resolute FP Canada Inc.

Power Law
1103 – 130 Albert Street
Ottawa, ON K1P 5G4

Maxine Vincelette

Tel.: 613.702.5560
Fax: 888.404.2227
Email: mvincelette@powerlaw.ca

Ottawa Agent for the Appellant/Respondent, Resolute FP Canada Inc.

TABLE OF CONTENTS

PART I – STATEMENT OF FACTS

I. OVERVIEW

1. There are three appeals before this Court, all of which concern an indemnity (variously referred to by the parties as the "Indemnity" or the "Ontario Indemnity") that the Province of Ontario granted in respect of environmental liabilities relating to a property in Dryden, Ontario.

2. The Court of Appeal for Ontario held that the Indemnity applied to a Director's Order that the province made, requiring the respondent, Weyerhaeuser Company Limited, and the appellant, Resolute FP Canada Inc. to provide mandatory environmental monitoring, reporting and financial assurance in respect of a waste disposal site (referred to variously as the "Waste Disposal Site", the "Site", the "WDS" or the "landfill") located on the property. The province has appealed from that finding.

3. The Court of Appeal also held that Resolute could not rely on the Indemnity, because Resolute's corporate predecessor, Bowater Pulp and Paper Canada Inc., had assigned the benefit of the Indemnity to Weyerhaeuser, when Bowater sold the property to Weyerhaeuser in 1998. The Court of Appeal reached this conclusion despite the fact that the Indemnity contains an enurement clause, extending its benefit to "successors and assigns" of Resolute's predecessor. Resolute has appealed from that finding.

4. Finally, the Court of Appeal held that: (i) Weyerhaeuser could not rely upon the Indemnity as a successor in title to the property; and (ii) while Weyerhaeuser received the benefit of the Indemnity when Weyerhaeuser bought the property from Bowater, the Court could not determine whether Weyerhaeuser retained the benefit of the Indemnity, after it subsequently sold the property to another company. Weyerhaeuser has appealed from that finding.

5. In this factum, Weyerhaeuser sets out its position in response to those issues raised by the appellant Resolute in its factum ("Resolute's Factum") on which Resolute's position is adverse to Weyerhaeuser's. Weyerhaeuser also relies upon the submissions contained in the factum that it filed in Weyerhaeuser's own appeal ("Weyerhaeuser's Original Factum).

6. For the reasons set out in Weyerhaeuser's Original Factum, Weyerhaeuser agrees with Resolute's primary position that both Weyerhaeuser and Resolute are entitled to rely upon the Indemnity. The issues to which Weyerhaeuser responds in this factum are ones that Resolute raises as alternative arguments to its primary position. Those arguments, and Weyerhaeuser's positions in response are:

(a) Resolute's argument that Bowater did not assign the full benefit of the Indemnity to Weyerhaeuser in 1998: The motion judge's finding that Bowater assigned the benefit of the Indemnity to Weyerhaeuser in 1998 is entitled to deference. The majority of the Court of Appeal found no palpable and overriding error in this finding. Resolute's argument that commercial reasonableness favours a finding that Bowater did not assign the benefit of the Indemnity to Weyerhaeuser must be rejected because: (i) on its plain wording, the Asset Purchase Agreement between Bowater and Weyerhaeuser (the "1998 Agreement") transferred the Indemnity to Weyerhaeuser; (ii) given the known contamination of the property, it would not have been commercially reasonable for Weyerhaeuser to acquire the property without receiving an assignment of the Indemnity; and (iii) the only commercially reasonable interpretation of the Indemnity and the 1998 Agreement is that both Resolute and Weyerhaeuser can enforce the Indemnity against the province.

(b) Resolute's argument that the purported assignment of the Indemnity to Weyerhaeuser is not legally valid under Ontario's *Conveyancing and Law of Property Act*: Weyerhaeuser agrees with Resolute that, regardless of whether or not the assignment complied with the requirements of the Act, it is enforceable in equity, because: (i) the assignment of the Indemnity was not absolute (since Resolute retained the benefit of the Indemnity in respect of liabilities relating to Resolute's past ownership of the property); (ii) the assignment did not increase the province's obligations under the Indemnity; and (iii) the province consented in advance to such assignments through the language of the Indemnity's enurement clause. In any event, the assignment of the Indemnity complied with the requirements of the *Conveyancing and Law of Property Act*, because the province has been given notice of the assignment.

7. The issues addressed in this factum are relevant only if this Honourable Court: (i) rejects the position, taken by both Weyerhaeuser and Resolute, that each company is entitled to rely upon the Indemnity in respect of liabilities that arise out of its period of ownership of the Property; and (ii) rejects the position, taken by Weyerhaeuser, that it can rely upon the Indemnity as a successor in title to the property (and not just as an assignee). These positions are articulated in detail in Weyerhaeuser's Original Factum.

II. STATEMENT OF FACTS IN RESOLUTE'S FACTUM

8. Weyerhaeuser accepts Resolute's summary of the facts relevant to this appeal, except with respect to the way in which Resolute characterizes and interprets: (i) the effect of the 1998 Agreement; and (ii) the manner in which the Courts below treated that agreement.

PART II – THE QUESTIONS IN ISSUE

9. In this factum, Weyerhaeuser responds to the following issues that are raised in Resolute's Factum:

(a) Did the Court of Appeal for Ontario err by concluding that Bowater absolutely assigned the Ontario Indemnity to Weyerhaeuser in 1998?

(b) Did the Court of Appeal for Ontario err by failing to conclude that any assignment of the Indemnity by Bowater to Weyerhaeuser was effective in law but not in equity?

PART III – STATEMENT OF ARGUMENT

I. BOWATER ASSIGNED THE INDEMNITY TO WEYERHAEUSER

10. Weyerhaeuser's position is that Bowater assigned the benefit of the Indemnity to Weyerhaeuser under the 1998 Agreement. The effect of that assignment is that Weyerhaeuser and Resolute (as Bowater's corporate successor) can each rely on the Indemnity in respect of liabilities to the period of time that it owned the property.

11. Weyerhaeuser agrees with Resolute that the only reasonable interpretation is that when the province granted the Indemnity in 1985, "the parties intended to protect the property's owner and its successors *and* assigns in perpetuity."[1] As noted by Resolute, the motion judge determined that the mutual intention of the parties to the Ontario Indemnity was to indemnify all future owners of the landfill against any environmental liability that might arise. Weyerhaeuser agrees that this is a finding of fact relating to the factual matrix and the parties' objective intentions and should not be overturned absent palpable and overriding error.[2]

12. Resolute argues, in the alternative, that Bowater did not assign away its rights under the Indemnity as part of the 1998 Agreement. Resolute did not advance this argument below. As noted in the Resolute Factum, before the motion judge, "Weyerhaeuser argued that it and Bowater could both benefit from the Ontario Indemnity." Resolute did <u>not</u> dispute Weyerhaeuser's entitlement to rely upon the Indemnity.[3] As Resolute acknowledges, it did not contest on appeal the motion judge's finding that Bowater had assigned the Indemnity to Weyerhaeuser.[4]

13. Resolute now argues that it would be commercially absurd for Bowater to have assigned the Indemnity to Weyerhaeuser. In response, Weyerhaeuser submits that: (i) the motion judge's finding that Bowater assigned the Indemnity to Weyerhaeuser is entitled to deference; (ii) Resolute's argument fails to give effect to the plain and unambiguous wording of the 1998 Agreement; (iii) Resolute's argument ignores the scope of the Indemnity; (iv) it would have been commercially absurd for Weyerhaeuser to purchase the property without receiving the benefit of the Indemnity; and (v) there is no commercial absurdity if both Weyerhaeuser and Resolute can rely upon the Indemnity.

---

[1] Factum of the Appellant, Resolute FP Canada Inc. (Supreme Court of Canada) [Resolute's Factum], para. 64.

[2] Motion Decision, paras. 19 and 63, Joint Appeal Record [JAR], Vol. 1, Tab 1, pp. 5 and 15. Resolute's Factum, para. 77.

[3] Factum of the Proposed Intervener, Resolute FP Canada Inc. (Superior Court of Justice), para. 88, JAR, Vol. VII, Tab 38, pp. 118-119; Factum of the Plaintiff, Weyerhaeuser Company Limited (Superior Court of Justice), para. 99, JAR, Vol. VII, Tab 37, p. 89.

[4] Resolute's Factum, para. 50.

A. The Motion Judge's Finding that the Indemnity was Assigned to Weyerhaeuser is Entitled to Deference

14. Weyerhaeuser submits that, for the reasons set out in paragraphs 46 to 52 of Weyerhaeuser's Original Factum, the motion judge's finding that the Indemnity was assigned to Weyerhaeuser was a finding of mixed fact and law that is entitled to deference and should be upheld, because the motion judge made no "palpable and overriding error".

15. Resolute argues that, while the motion judge's conclusion that Bowater assigned the Indemnity to Weyerhaeuser would "ordinarily" be entitled to deference in the Court of Appeal (as a question of mixed fact and law), the Court erred in giving deference in the circumstances of this case.[5] This is incorrect.

16. As Resolute acknowledges, a motion judge's contractual interpretation normally can only be overturned if there is a palpable and over-riding error. The majority of the Court of Appeal identified no such error. Accordingly, the Court was right to uphold the motion judge's finding that the 1998 Agreement transferred the benefit of the Indemnity to Weyerhaeuser.

17. Resolute argues that the motion judge's finding is not entitled to deference because the effect of the assignment upon Resolute's rights under the Indemnity was not argued before the motion judge, and because the Court of Appeal only asked the province and Weyerhaeuser to submit supplementary submissions on the nature and scope of the assignment.[6]

18. Weyerhaeuser submits that this argument is untenable, given that:

(a) Resolute's argument conflates two separate issues: (i) whether the Indemnity was assigned to Weyerhaeuser under the 1998 Agreement; and (ii) the effect of that assignment upon Resolute's right to rely upon the Indemnity. Weyerhaeuser agrees that the second issue was not argued before the motion judge and was decided by the Court of Appeal as a matter of first instance. But the first issue was fully argued before the motion judge. The province vigorously contested Weyerhaeuser's right to rely upon the Indemnity as an assignee under

---

[5] Resolute's Factum, para. 88.

[6] Resolute's Factum, para. 89.

the 1998 APA.[7] For its part, Resolute took the position in its factum that it "did not assign away or give up the benefit of the Indemnity in its 1998 sale of the Undertaking to Weyerhaeuser."[8] Given that the question of whether or not the Indemnity was assigned to Weyerhaeuser was argued fully before the motion judge, his finding that it was assigned (which was upheld by the majority of the Court of Appeal) is entitled to deference.

(b) It is not accurate to suggest, as Resolute does, that the Court of Appeal requested supplementary submissions on the nature and scope of the assignment from Weyerhaeuser and the province.[9] In fact, the Court of Appeal requested "submissions on the effect of [an] ambiguity [in the 1998 Agreement] on the status of the Mercury Parcel under the 1998 Agreement: was it an excluded asset or a purchased asset?"[10] There is no dispute between the parties that the Waste Disposal Site was purchased by Weyerhaeuser under the 1998 Agreement, before being transferred back to Resolute after it was severed from the rest of the property. The Court did not request supplementary submissions about the assignment of the Indemnity.

---

[7] Factum Of Her Majesty The Queen As Represented By The Ministry Of The Attorney General (Superior Court of Justice), paras. 80 - 85, JAR, Vol. VII, Tab 36, pp. 22 - 23.

[8] Factum of the Proposed Intervener, Resolute FP Canada Inc. (Superior Court of Justice), paras. 86 - 88, JAR, Vol. VII, Tab 38, pp. 118 - 119.

[9] Resolute's Factum, paras. 53 and 89.

[10] Letter from the Court of Appeal for Ontario requesting further written submissions, JAR, Vol. VIII, Tab 48, pp. 176 – 178. While the province did make certain submissions as to whether the 1998 Agreement had the effect of assigning the Indemnity to Weyerhaeuser, Weyerhaeuser took the position that those submissions were improper, as being unresponsive to the Court's request for further submissions. Weyerhaeuser did feel compelled to respond to the province's submissions.

B. 1998 Agreement Clearly Effected a Transfer of the Indemnity to Weyerhaeuser

19. Resolute argues that "There is nothing in the 1998 Agreement suggesting Bowater intended to assign the benefit of the Ontario Indemnity to Weyerhaeuser."[11] This ignores the fact that the 1998 Agreement expressly provided that "the Vendor agrees to sell, assign and transfer to the Purchaser … the full benefit of all … indemnities …received by the Vendor on the purchase or other acquisition of any part of the Purchased Assets or otherwise."[12] The majority of the Court of Appeal accepted that the "plain and unambiguous language" of this section had the effect of assigning the benefit of the Indemnity to Weyerhaeuser.[13] The motion judge had reached the same conclusion.[14] The dissenting judge in the Court of Appeal did not consider the issue.

20. Resolute's position appears to be that this plain and unambiguous language had no effect on the Indemnity, because it referred to "indemnities" globally, without expressly singling out this particular Indemnity. Resolute cites no authority for the proposition that parties must individually identify every asset or right that is transferred under an agreement and cannot group assets or rights by category. No such authority exists.

21. Since the 1998 Agreement, by its express terms, had already assigned to Weyerhaeuser the benefit of the Indemnity, there was no reason to refer to it expressly in the Amending Agreement or the Lease, as Resolute suggests in its factum.[15] By the same token, there was no reason for the Amending Agreement to address the "return" of the Indemnity to Bowater after the Waste Disposal Site was severed and transferred back to Bowater.

---

[11] Resolute's Factum, para. 30.

[12] 1998 Agreement, Exhibit "N", Rawn Affidavit, JAR, Vol. V, Tab 27N, p. 24, Motion Decision, para. 20, JAR, Vol. 1, Tab 1, p. 5, Resolute's Factum, para. 30.

[13] Appeal Decision, para. 156, JAR, Vol. 1, Tab 5, p. 80. Resolute's Factum, para. 93.

[14] Motion Decision, para. 64, JAR, Vol. 1, Tab 1, p. 15.

[15] Resolute's Factum, para. 36.

C. The Indemnity Covers the Entire Property, Not Only the Waste Disposal Site

22. A number of Resolute's arguments are premised upon the assumption that the Indemnity applies only to the Waste Disposal Site. This is incorrect. The Indemnity applies to the entire property.

23. Resolute makes the following arguments that implicitly treat the Indemnity as applying only to the Waste Disposal Site:

(a) Resolute argues that the Indemnity was not being used in the business being carried on by Bowater, because the Waste Disposal Site had ceased to operate and was not used by the business in 1998.[16]

(b) Resolute relies upon the fact that when the parties were unable to sever the Waste Disposal Site (which Weyerhaeuser did not want to purchase) from the rest of the property, they entered into an agreement, pursuant to which Weyerhaeuser leased the Site back to Resolute. Once the severance was obtained, Weyerhaeuser transferred legal title to the Site back to Bowater. Resolute notes that pursuant to the lease of the Site, Bowater covenanted to "fully indemnify Weyerhaeuser from all claims, costs and losses related in any way to the [Waste Disposal Site]…"[17] Resolute then argues that this separate indemnity is inconsistent with the notion that Resolute transferred the benefit of the Ontario Indemnity to Weyerhaeuser.

24. With respect, these arguments overlook a fundamental fact: the Indemnity covers the entire property. It is not limited to liabilities associated with the Waste Disposal Site. By its express terms, the Indemnity applies to "the discharge or escape or presence of any pollutant …. from or in the plant or plants or lands or premises forming part of the Dryden assets."[18]

---

[16] Resolute Factum, paras. 31 and 92.

[17] Resolute Factum, paras. 98(6) and 37.

[18] Court of Appeal Reasons, para. 31, JAR, Vol. 1, Tab 5, pp. 37 - 39, quoted at para. 24 of Resolute's Factum.

25. The scope of the Indemnity is an important consideration when determining whether an assignment of the Indemnity to Weyerhaeuser would have been commercially reasonable. Even if the Waste Disposal Site had been severed before Weyerhaeuser bought the property, Weyerhaeuser would still have faced potential environmental liability with respect to the rest of the property. The Indemnity would have protected Weyerhaeuser from that liability.

26. The fact that the parties originally did not intend for Weyerhaeuser to acquire the Waste Disposal Site, and the fact that Bowater gave Weyerhaeuser a separate indemnity in respect of the Waste Disposal Site, do not change the fact it would not have been commercially reasonable for Weyerhaeuser to purchase the rest of the property without an assignment of the Ontario Indemnity.

27. Even in respect of the Waste Disposal Site, it was perfectly reasonable for Weyerhaeuser to seek both an assignment of the Ontario Indemnity and a separate indemnity from Bowater. As the majority of the Court of Appeal held, it was commercially reasonable for Weyerhaeuser to seek to maximize its protection against environmental liabilities associated with the Waste Disposal Site.[19] As it turned out, Weyerhaeuser's cautious approach was justified: Bowater ended up insolvent and unable to compensate Weyerhaeuser under its indemnity, and the province reneged on the Ontario Indemnity, forcing Weyerhaeuser to litigate its right to be indemnified.

D. Commercial Absurdity of Weyerhaeuser Purchasing Property Without Indemnity

28. Weyerhaeuser agrees with Resolute that it would have been commercially absurd for Bowater to assign the Indemnity if, by doing so, Bowater (and its successor, Resolute) would lose the benefit of the Indemnity. But, by the same token, it would have been absurd for Weyerhaeuser to purchase the property (with its known environmental issues) without receiving an assignment of the Indemnity. As Resolute acknowledges, unless the Indemnity can protect successive owners of the Property, "the asset would be stranded: no seller would sell the indemnity with the land, but no buyer would permanently purchase the land without the indemnity."[20]

---

[19] Appeal Decision, para. 159, JAR, Vol. 1, Tab 5, p. 81.

[20] Resolute's Factum, para. 73.

E. No Commercial Absurdity if Both Resolute and Weyerhaeuser Can Rely Upon the Indemnity

29. If this Court accepts the arguments in Weyerhaeuser's Original Factum and Resolute's primary argument, and concludes that both Resolute and Weyerhaeuser can rely upon the Indemnity, no absurdity will result.

30. The motion judge accepted Weyerhaeuser's position that, when the Indemnity was assigned from one party to the next, each successive owner of the property could benefit from the Indemnity in respect of liabilities that arose while that owner was in possession of the property. On this approach, Weyerhaeuser was entitled to the benefit of the Indemnity in respect of liabilities arising within the period during which it owned the property. Since the Director's Order as against Weyerhaeuser was based solely on Weyerhaeuser's ownership of the property, the Indemnity would apply to any costs that Weyerhaeuser might incur as a result of the Order. This interpretation is analogous to a "claims occurred" insurance policy, as coverage is governed by when the facts giving rise to the losses occurred. Under this approach, Weyerhaeuser could benefit from the Indemnity, because Weyerhaeuser's costs arose out of its ownership of the property during the time that Weyerhaeuser "held" it.

31. As Resolute notes, the principle that a contract should be interpreted in such a way as to avoid commercial absurdity in this case leads inexorably to the conclusion that the original parties to the Indemnity must have intended that the property's owner could sell or transfer the property in a manner that would both provide protection to a purchaser while simultaneously protecting the vendor and its successors from environmental liability based upon contamination that had occurred by the time the province granted the Indemnity.[21]

II. THE *CONVEYANCING AND LAW OF PROPERTY ACT* DOES NOT AFFECT WEYERHAEUSER'S RIGHT TO RELY ON THE INDEMNITY

32. Resolute argues that, pursuant to section 53 of Ontario's *Conveyancing Law of Property Act*[22] ("*CLPA*") any assignment of the Indemnity by Bowater to Weyerhaeuser could not have taken effect at law, but only in equity. Resolute raises this argument for the first time in this Court.

---

[21] Resolute's Factum, paras. 81 to 83.

[22] R.S.O. 1990, c. C.34.

33. In response to Resolute's submissions regarding the *CLPA*, Weyerhaeuser:

(a) Agrees with Resolute that Weyerhaeuser can enforce the Indemnity in equity.[23] The assignment of the Indemnity is valid because: (i) it is not subject to s. 53 of the *CLPA*, because it is not "absolute" in the sense contemplated by that section; (ii) it is specifically authorized, in advance, by the Indemnity's enurement clause; and (iii) it does not increase the obligations of the province (the counter-party to the Indemnity); and

(b) Submits, in the alternative, that Weyerhaeuser has complied with the requirements of s. 53 of the *CLPA*, because the province has notice of the assignment.

A. Section 53 of the CLPA

34. Section 53 of the *Conveyancing and Law of Property Act* provides that, if a party to a contract assigns its rights to another person without the consent of the counter-party to the contract, that assignment will nonetheless be valid at law, provided that the assignor has given notice to the counter-party, and the counter-party has not objected.[24] The section provides as follows:

> 53(1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.
>
> (2) In the case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action has had notice that such assignment is disputed by the assignor or any one claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action, the debtor, trustee or other person may call upon the several persons making claim thereto to interplead concerning the same, or may pay the same into the

---

[23] Resolute's Factum, para. 101.

[24] *JVJ Consulting Inc. v. Barnell*, 2017 ONSC 1533, para. 6. *Rodaro v. Royal Bank*, 2002 CanLII 41834 (ONCA), paras. 33 - 35.

> Superior Court of Justice under and in conformity with the provisions of law for the relief of trustees.[25]

35. Section 53 of the *CLPA* has its origins in England in the 1875 merger of the Courts of Law and Equity.[26] Prior to that change, assignments of choses in action were not enforceable in law, but were enforceable in equity. The purpose of the section was to allow assignees to sue obligors directly, without having to add the assignor of the chose in action and "claim through" that assignor in equity. The section does not affect the validity of equitable assignments of choses in action.

B. Weyerhaeuser Can Rely Upon the Indemnity in Equity

36. Weyerhaeuser agrees with Resolute that a partial assignment is not subject to section 53 of the *CLPA* and is enforceable in equity. The assignment of the Indemnity was a partial assignment, in the sense that Bowater retained the benefit of the Ontario Indemnity for any liability related to its ownership of the property prior to the transfer to Weyerhaeuser, while Weyerhaeuser would have the benefit of the Ontario Indemnity for any liability related to its subsequent ownership of the property.[27]

37. The analysis of the assignment that the majority of the Court of Appeal undertook ignored this partial nature of the assignment. Instead, the majority assumed that the assignment was absolute and, as Resolute notes, concluded that "an absolute assignment of a chose in action, which leaves no interest in the assignor, extinguishes the assignor's right to later call on the obligor to perform the contract."[28] With respect to the majority below, this purported analysis is nothing more than a tautology: it is axiomatic that if the assignment of a chose in action is one "which leaves no interest in the assignor", that assignment must extinguish the assignor's rights. That is what it means for the assignment to have left no interest in the assignor. The majority's error lay in assuming that the assignment of the Indemnity from a vendor to a purchaser left the vendor with no interest in the Indemnity.

---

[25] *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53 [Emphasis added]

[26] Waddams, S.M. *The Law of Contracts*. (Toronto: Canada Law Book, 2017) at pp. 178 - 179.

[27] Resolute's Factum, paras. 110 - 113.

[28] Resolute's Factum, para. 56. Appeal Decision, para. 194, JAR, Vol. 1, Tab 5, p. 95 - 96.

38. Weyerhaeuser has set out in Weyerhaeuser's Appeal Factum its argument as to why the majority of the Court of Appeal erred in finding that an assignment of an indemnity extinguishes the assignor's rights under the indemnity, even where the indemnity contains an enurement clause and the assignment does not increase the obligations of the counter-party.

39. A partial assignment can take effect in equity, provided that the legal holder of the chose in action (which would be Resolute, if the assignment was ineffectual at law) is a party to any proceeding by the beneficial holder (here, Weyerhaeuser) to enforce its rights. The purpose behind the requirement that the assignor be a party is to bind the assignor so as to save the obligor from the possibility of another action against it for the same obligation. [29] Weyerhaeuser has complied with that requirement in this case, as Resolute is a party to this proceeding.

40. It is worth noting that, pursuant to the terms of its enurement clause, the Indemnity could be validly assigned without the province's consent. The enurement clause contained in the Indemnity expressly required the owner's consent if the province wanted to assign the Indemnity, but <u>not</u> the province's consent if the property owner wanted to assign the Indemnity:

> 6. The indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign the indemnity without the prior written consent of the other parties hereto.[30]

41. There is no reason why a party like the province should not to be permitted to enter into a contract that binds it to a class of persons (in this case successive owners of the property), without requiring notice of each change of counter-party at the time it occurs. This is particularly true in this case, because the province's obligation under the Indemnity (namely, to assume all environmental liabilities associated with the property) would not increase as a result of the assignment.

---

[29] Waddams, S.M. *The Law of Contracts*. (Toronto: Canada Law Book, 2017) at pp. 178 - 179. *6888350 Ontario Ltd. v. Piron*, 1994 CarswellOnt 348 (Ont GD), para. 175. *Gentra Canada Investments Inc. v. Lipson*, 2011 ONCA 331, para. 61, *Landmark Vehicle Leasing Corp. v. Mister Twister Inc.*, 2015 ONCA 545, paras. 10 - 14.

[30] Indemnity, Exhibit "J" to the Rawn Affidavit, JAR, Vol. IV, Tab 27 J, pp. 191 - 192, clause 6.

42. In effect, the province, through the terms of the enurement clause, consented in advance to the assignment of the Indemnity to any party that might otherwise incur environmental liability in respect of the province.[31] As a result, the assignment is effective in equity, and there is no need for Weyerhaeuser to rely upon, or comply with, the *CLPA* in order to validate the assignment.

C. Weyerhaeuser has Complied with Section 53 of the CLPA

43. In the alternative, if the assignment of the Indemnity is subject to section 53 of the *CLPA*, then the assignment would still be valid. Section 53 provides that an assignment of a chose in action transfers the legal right to the assignee (in this case, Weyerhaeuser) from the date on which written notice has been given to the obligor (in this case, the province). The purpose of the notice provision is to ensure that the obligor is aware of the identities of the assignor and the assignee and, in the event that the assignor disputes the validity of the assignment, can have any disputed funds interpleaded into court, pursuant to section 53(2). In this way, the obligor is protected from the possibility of another action against it for the same obligation, without the need to name the assignor as a party to the action (as is required in the case of equitable assignments).[32]

44. In this case, Weyerhaeuser (through its counsel) gave written notice to the province that it was relying upon the Indemnity "as the successor and assign",[33] well before commencing the present proceeding, asserting its rights under that Indemnity. As a result, the province received notice of the assignment and Weyerhaeuser has complied with s. 53 of the *CLPA*. Given that both Weyerhaeuser and Resolute are parties to this proceeding, the need for notice is, in any event, obviated in this case.

---

[31] *Equirex Leasing Corp. v. 126253 Ontario Inc*., 2013 ONSC 7831, paras. 16 - 17.

[32] *Gentra Canada Investments Inc. v. Lipson*, 2011 ONCA 331, para. 61, *Landmark Vehicle Leasing Corp. v. Mister Twister Inc*., 2015 ONCA 545, paras. 10 - 14.

[33] Letter from counsel for Weyerhaeuser to Ministry of the Attorney General, September 16, 2011, Exhibit "D" to the affidavit of Charles K. Douthwaite, sworn November 24, 2014, JAR, Vol. VI, Tab 28 D, p. 58.

PART IV – SUBMISSIONS IN SUPPORT OF ORDER SOUGHT FOR COSTS

45. For the reasons set out in Weyerhaeuser's Original Factum, Weyerhaeuser submits that the costs of this appeal are covered by the Indemnity. Weyerhaeuser accordingly seeks an order requiring the province to pay Weyerhaeuser's costs of this appeal on a full indemnity basis.

PART V – ORDER SOUGHT

46. Weyerhaeuser seeks an order restoring the decision of the motion judge and awarding Weyerhaeuser its costs on a full indemnity basis in the Court of Appeal for Ontario and before this Court.

PART VI – SUBMISSIONS ON SEALING OR CONFIDENTIALITY ORDER

47. There is not a sealing, confidentiality Order or publication ban in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 25th day of February 2019.

FOR Christopher D. Bredt
Markus F. Kremer
Alannah Fotheringham

PART VII – TABLE OF AUTHORITIES

No.	Authority	Paragraph Reference
Case Law		
1.	*6888350 Ontario Ltd. v. Piron*, 1994 CarswellOnt 348 (Ont GD).	39
2.	*Equirex Leasing Corp. v. 126253 Ontario Inc.*, 2013 ONSC 7831	42
3.	*Gentra Canada Investments Inc. v. Lipson*, 2011 ONCA 331.	39, 43
4.	*JVJ Consulting Inc. v. Barnell*, 2017 ONSC 1533	34
5.	*Landmark Vehicle Leasing Corp. v. Mister Twister Inc.*, 2015 ONCA 545.	39, 43
6.	*Rodaro v. Royal Bank*, 2002 CanLII 41834 (ONCA)	34
Other Sources		
7.	Waddams, S.M. *The Law of Contracts*. (Toronto: Canada Law Book, 2017)	35, 39

PART VII – STATUTORY PROVISIONS

Statute, Rule, Legislation	Section / Rule, etc.
Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34	53(1)

***Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53(1)**	
Assignments of debts and choses in action **53** (1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor. (2) In the case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action has had notice that such assignment is disputed by the assignor or any one claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action, the debtor, trustee or other person may call upon the several persons making claim thereto to interplead concerning the same, or may pay the same into the Superior Court of Justice under and in conformity with the provisions of law for the relief of trustees.	**Cession de créances et d'autres droits d'action** **53** (1) Est valable, si elle ne vise pas à créer une charge seulement, la cession inconditionnelle d'une créance ou d'un autre droit d'action, faite à compter du 31 décembre 1897, par un écrit que signe le cédant, si le cédant en donne avis exprès et par écrit à la personne qui en est redevable à son endroit, notamment au débiteur ou au fiduciaire. La cession transporte, à compter de la date de l'avis, les droits du cédant reconnus par la common law, les recours qu'il possède, reconnus ou non par la common law, et le pouvoir de donner sans la participation du cédant une quittance libératoire, sous réserve des droits qui auraient eu en equity préférence sur ceux du cessionnaire, si le présent article n'avait pas été adopté. (2) Si le débiteur, le fiduciaire ou la personne qui est redevable de la créance ou du droit d'action cédé a eu connaissance que le cédant ou son ayant droit conteste la cession ou qu'il existe d'autres prétentions en litige au sujet de la créance ou du droit d'action, il peut exiger que les auteurs de ces prétentions procèdent par voie d'interpleader, ou en consigner le montant auprès de la Cour supérieure de justice conformément aux dispositions légales qui prévoient la libération des fiduciaires.